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Diane Matsuda, Executive Officer
California Cultural and Historical Endowment
900 "N" Street, Room 500
P.O. Box 942837
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RE: Letter Advice on Grants Relating to Buildings With Religious Affiliations

Dear Ms. Matsuda:

The California Cultural and Historical Endowment (the Endowment) has requested this office's advice as to whether, consistent with certain provisions of California Constitution article 1, section 4, commonly referred to as the "establishment clause" and the "no preference clause", and certain provisions of California Constitution article XVI, section 5, commonly referred to as the "no aid to religion provisions," the Endowment can grant funds for the reconstruction or renovation of buildings or facilities with historical or current religious affiliations. In framing its primary question, the Endowment has asked if our analysis is affected by whether: (a) the building or facility is currently in public ownership or is currently affiliated with a religious organization; (b) the building or facility is not used for religious purposes; and (c) the purpose of the grant is restricted to public health and safety improvements, such as satisfying building standards or the requirements of the Americans with Disabilities Act, as compared with the renovation or restoration of murals, mosaics or other ornamentation on the building or facilities.

This letter will address these questions for the purpose of providing general guidance for the Endowment's use during the grant application review and funds distribution process.[1] An attempt to provide more specific advice is not possible at this time because, as discussed below,

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[1]Your letter referenced several anticipated applications for illustrative purposes and we understand that none of these applications are currently before the Endowment. For these reasons, and because specific information is needed before we can offer an opinion on any specific grant proposal, we have not attempted to provide an opinion on the propriety of any of these possible applications.

the laws concerning interactions between government and religion are complex and conclusions regarding whether grants would or would not be in compliance with these laws will typically be fact driven. Instead, where requested, we will provide counsel on individual applications as they are submitted.

In addition, we note that this letter addresses only the effects of the identified provisions of the California Constitution. It does not address whether any grant is permitted pursuant to the terms of the Endowment's authorizing legislation. The Endowment, of course, must comply with that legislation.[2] Further, it also must comply with the conditions that pertain to any source of funding used by the Endowment. We understand that the Endowment's only present source of funding consists of proceeds of general obligation bonds issued pursuant to the California Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2002, adopted by the voters at the primary election of March 5, 2002, as Proposition 40. The Endowment must also comply with the terms of that act when using these funds.

Because the Endowment only has access to bond funds at the current time, we have a final cautionary note. In providing answers to the Endowment's questions, we have been influenced by the fact that this office will issue one or more opinions as to the validity of the State general obligation bonds issued pursuant to Proposition 40. The bond market requires that this office be able to issue an "unqualified" opinion as to the validity of those bonds. To do so, this office must reach, with a high degree of confidence, the conclusion that, under the law in effect on the date of our opinion, the California Supreme Court, acting reasonably after a proper briefing on the issues, *would* reach the legal conclusions stated in our opnion.[3] While this letter offers no opinion on any specific grants, our obligations under this "unqualified" opinion standard means that this letter was written to provide advice that we have a high degree of confidence would be persuasive to the California Supreme Court.[4]

Brief Answers

1. Article I, section 4 and article XVI, section 5 of the California Constitution place

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[2]Where there is a conflict between the Endowment's enabling legislation and the State Constitution, the constitutional provision prevails.

[3]Model Bond Opinion Report, National Association of Bond Lawyers Committee on Opinions and Documents (2003).

[4]The Endowment is authorized to receive and manage gifts and other financial support from other public and private sources. Where the source of funds for a grant is other than a State bond, it is possible that our analysis and conclusion might not be the same as in this letter.

significant but not absolute restrictions on the authority of the Endowment to approve grants of state bond money for the reconstruction or renovation of buildings or facilities with historical or current religious affiliations. How these sections apply to each grant will depend on a number of factors, including whether (1) the grant would have the direct, immediate, and substantial effect of promoting religious purposes, (2) the recipient of the benefit of the grant is "pervasively sectarian," (3) the grant gives the appearance of preference for a religion and (4) the grant would lead to an "excessive entanglement" between government and a religious institution. If the answer to any of these questions is yes, then the grant approval would violate the California Constitution. Additionally, every grant should have an articulated secular primary purpose,

2. Ownership of a facility is an important factor in conducting a constitutional analysis, particularly under article XVI, section 5. If a facility is owned by a religious organization and is used for religious purposes, it is unlikely to be eligible for a grant from the Endowment. If a building with historical religious affiliations is in public ownership, it may be eligible for a grant from the Endowment. Since the analysis is fact-specific, however, it is not possible to provide a bright-line rule in the abstract.

3. While a grant relating to a building or facility that is not used for religious purposes would appear to have a secular purpose, the use of the structure is not determinative of whether a grant may be approved. Instead, if the building or facility is affiliated with an institution that is "pervasively sectarian," the grant may not be appropriate.

4. Whether the grant is for public health and safety purposes is significant, but again is not the sole factor to be considered when analyzing the propriety of a grant. A secular objective alone will not support the conclusion that a grant will not have the effect of advancing religion or creating the appearance of a preference for a religion.

Discussion of Article XVI, Section 5
("No Aid to Religion Provisions") of the California Constitution

Article XVI, section 5 of the California Constitution provides that the Legislature shall not:

> . . . ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city

> and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . . .

In formal opinions issued by this office, we have characterized article XVI, section 5 as constituting "the definitive statement of the principle of government impartiality in the field of religion."[5] By its terms, article XVI, section 5 forbids the grant of anything to or in aid of any sectarian purpose and prohibits public help to "support or sustain" a sectarian institution.[6] Thus, of the three constitutional provisions discussed in this letter, article XVI, section 5 will be the one most likely to affect the Endowment's grant program.

A. California Courts Have Established the"Direct, Immediate and Substantial Effect of Promoting Religious Purposes" Test for Purposes of Applying the "No Aid To Religion" Provisions.

In *California Educational Facilities Authority v. Priest,* (1974) 12 Cal.3d 593 (*"Priest"*), the California Supreme Court construed the terms of article XIII, section 24, a predecessor to article XVI, section 5, and articulated the test used by California courts to determine whether a challenged governmental benefit is consistent with article XVI, section 5. In articulating this test, the *Priest* court recognized that the no aid to religion provisions were intended by those drafting the California Constitution of 1879 to "insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be directed to the advancement or support of religious or sectarian purposes."[7]

The court found that article XIII, section 24 "forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes."[8] The Supreme Court went on to find, however, that the no aid to religion provisions

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[5]37 Ops.Cal.Atty.Gen. 105, 107 (1961), and 66 Ops. Cal. Atty. Gen. 50, 63 (1983).

[6]When this provision was originally added to the Constitution in 1879, "the term 'purpose' commonly meant in this context an '[e]nd; effect; [or] consequence. . . .' In other words, aid to a sectarian purpose simply meant aid to a sectarian use." (*Paulson v. City of San Diego* (2002) 294 F.3d 1124, 1129-1130, citing Worcester, Joseph E., A Dictionary of the English Language 1158 (New ed. Supp. 1897).)

[7]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 604.

[8]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 605, footnote 12.

had never been interpreted "to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote and incidental benefit from a statute which has a secular primary purpose," and referred to expenditures of public money on sidewalks, streets, and sewers, and the services of police and fire departments as examples of such indirect, remote and incidental benefits.[9]

1. Indirect, Remote and Incidental Benefits With a Secular Primary Purpose Are Not Prohibited.

Following the test articulated in *Priest,* the courts have upheld "indirect, remote and incidental benefits" received by sectarian institutions, as long as the purpose of providing those benefits was in support of a secular primary purpose. The California Supreme Court decision in *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, serves as an example of the type of indirect, remote or incidental benefit that does not violate the prohibition against government aid to religion. Several community organizations challenged the statutory exemption from local landmark preservation laws for noncommercial property owned by religious organizations. The court held the exemption available only to religious organizations did not violate article XVI, section 5, because any benefit received was indirect, remote or incidental to a primarily public purpose. The Supreme Court said with respect to article XVI, section 5, that:

> permitting a religious entity to exempt its noncommercial property from landmark designation status simply leaves the property in the status it otherwise occupied. While there may be a benefit as compared to properties that are subjected to landmark designation, neither the state nor the local governmental entity expends funds, or provides any monetary support, for the exempted property or its owner.[10]

Similarly, the courts have interpreted article XVI, section 5 to permit a governmental entity to rent space to a sectarian institution, as long as the opportunity to lease was also granted to non-sectarian institutions, and the terms of the lease are the same as if the space were rented to

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[9]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at pages 604-605; accord, *Bowker v. Baker* (1946) 73 Cal.2d 653, 666-667.

[10]*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at page 721.

a non-sectarian institution.[11] In these situations, the courts have recognized that the primary public purpose being served by the lease was to make money from the public lands. Any benefit derived by the religious lessees in these cases was "incidental" to this objective.[12]

2. An Identifiable Secular Objective Alone Will Not Support a Conclusion That A Grant Has No Direct, Immediate and Substantial Effect of Advancing Religion.

The *Priest* court warned that "the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion . . ." and, as an example, referred to the Court of Appeal's decision in *Frohliger v. Richardson* (1923) 63 Cal.App. 209 ("*Frohliger*").[13]

In *Frohliger v. Richardson*, a California Court of Appeal determined that an appropriation of state funds to be used by a board of commissioners appointed by the Governor to restore the Mission of San Diego was impermissible under article IV, section 30 of the California Constitution, a predecessor to article XVI, section 5. In reaching its conclusion, the court acknowledged that the California missions are of historical and educational interest, and stated that it "endeavored to make it clear that we are in sympathy with the meritorious movement having for its object the restoration and preservation of the missions."[14] Nevertheless, the court ultimately focused on the fact that the Mission of San Diego was owned by the Roman Catholic Church, a sectarian institution, and that the title to the property was in the name of the Archbishop of San Francisco. The court concluded that this ownership, in and of itself, was sufficient to raise the bar of the no aid to religion provisions of the California Constitution.[15]

In *Priest,* the Supreme Court considered the no aid to religion clause in the context of a challenge to a state program offering private colleges and universities the opportunity to borrow

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[11]*Christian Science Reading Room Jointly Maintained v. City and County of San Francisco* (1986) 784 F.2d 1010 and *Woodland Hills Homeowners Organization v. Los Angeles Community College District* (1990) 218 Cal.App.3d 79.

[12]E.g., *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, supra,* 784 F.2d 1010, 1014, 1016.

[13]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 604.

[14]*Frohliger v. Richardson, supra,* 63 Cal.App. at page 217.

[15]*Frohliger v. Richardson, supra,* 63 Cal.App. at page 217.

money through the use of a state instrumentality at a cost below that of conventional financing. In determining that the particular program before it did not violate the no aid to religion provisions, the *Priest* court focused on the following: the program did not require the outlay or appropriation of public money, but only the time spent by public officials who served the program; the benefits of the program were granted to sectarian and nonsectarian colleges on an equal basis; aid for religious projects was strictly prohibited; and the primary purpose of the program was to advance the public interest of education, which purpose was constitutionally mandated.[16] Moreover, the case arose as a facial challenge to the financing statute; consequently, the court did not consider whether aid to a particular college or for a specific type of construction project was valid.[17]

The Ninth Circuit of the United States Court of Appeals addressed whether government aid has a secular primary purpose in *Hewitt v. Joyner* (9th Cir. 1991) 940 F.2d 1561 ("*Hewitt*"). The court considered a challenge by local residents to San Bernardino County's ownership and maintenance of a park that contained exclusively immovable religious statuary depicting scenes from the New Testament. The court found that the county's legitimate secular interest in attracting tourist dollars did not outweigh the California Constitution's ban on government aid to religion and that it did not matter that the amount of government aid to the statuary park was relatively small.[18] The court concluded that the *Frohliger* decision was "a strong statement by the California courts that the existence of a legitimate secular purpose will not redeem otherwise prohibited governmental aid to religion."[19]

The *Hewitt* court acknowledged the county's argument that "[t]here is no constitutional formulation that religious art inside a museum is lawful preservation but outside a museum is unlawful establishment of religion" by responding:

> Their argument highlights the difficulty of this case. Neither the California nor the United States Constitution prohibit governments from preserving their cultural and artistic heritage. However, the argument that a religious display is art or a tourist attraction will

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[16]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at pages 605 - 606.

[17]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 596.

[18]*Hewitt v. Joyner, supra,* 940 F.2d at pages 1570-1571, citing *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 806 (conc. opn. of Bird, CJ.).

[19]*Hewitt v. Joyner, supra,* 940 F.2d at pages1570.

> not protect the display from the restrictions on government-sponsored religion which the people of California have put in their constitution.[20]

Applying these cases to your questions, we note that the articulated sectarian purposes of the Endowment's grant program are numerous and obviously beneficial to the public. They indicate the Legislature's desire to both preserve and interpret the State's early history, including the Gold Rush and the era of the California Missions, but also to "preserve, interpret, and enhance understanding and appreciation of the state's subsequent cultural, social, and economic evolution."[21] It is our understanding that grant applicants must articulate one or more of these as the secular purpose for their proposed use of bond proceeds. At the present time, however, and particularly given the level of certainty required to issue an unqualified bond opinion, we are not able to conclude that one or even some of these purposes would be sufficient to, in the words of the *Priest* court, "immunize" a grant from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion. Instead, we would have to consider the identified purpose and "effect" of each grant application.

3. The Courts Have Held That Aid to Pervasively Sectarian Institutions Has the "Direct, Immediate and Substantial Effect of Promoting Religion."

In the context of discussing whether the California Educational Financing Authority's program violated the establishment clause, the Supreme Court in *Priest* determined that the primary effect of the program did not advance religion. In particular, the court focused on the program's statutory prohibition against participating colleges either restricting entry on racial or religious grounds or requiring students to receive instruction in the tenets of a particular faith. In a footnote, the court said that a different conclusion might be compelled "if the Authority were to exercise its powers in aid of an institution which is pervasively sectarian."[22] The court emphasized that the fact that an institution is affiliated with or governed by a religious organization is insufficient, without more, to establish that aid to that institution impermissibly advances religion, and described the "pervasively sectarian" analysis:

> "Aid normally may be thought to have a primary effect of

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[20] *Hewitt v. Joyner, supra,* 940 F.2d at page 1572.

[21] Education Code section 20070.

[22] *California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at pages 601-602, footnote 8, citing *Hunt v. McNair* (1973) 413 U.S. 734, a case addressing the establishment clause of the United States Constitution.

> advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. [Citation.]"[23]

In 1981, in *California Teachers Association v. Riles* (1981) 29 Cal.3d 794 ("*Riles*"), the Supreme Court described this "pervasively sectarian" analysis as a material factor in the *Priest* decision.[24] In *Riles*, the Supreme Court held unconstitutional, under the no aid to religion provision, a statute which authorized the Superintendent of Public Instruction to lend public school textbooks, without charge, to students attending non-profit, non-public schools. The court held the benefit to religious schools provided by the statute was neither indirect nor remote, and the character of the benefit resulted in support of sectarian schools. In so doing, the court rejected the argument that the beneficiaries of the program were the students, rather than the schools, and determined that the benefits were inseparable.[25] The court also concluded that the provision of textbooks at public expense constituted an appropriation of state funds, and that this made the program distinguishable from the generalized services government might provide to schools in common with others, such as fire and police protection, maintenance of roads and sidewalks, and similar public services.[26]

The most recent decision regarding the no aid to religion provision is *California Statewide Communities Development Authority v. All Persons Interested,* issued in March, 2004.[27] In that decision, a California Court of Appeal concluded that whether the recipient of a governmental benefit is "pervasively sectarian" is an appropriate consideration in ascertaining under article XVI, section 5, whether the proposed program has a "direct, immediate, and substantial effect of advancing religion."[28] The court determined that "the fact that certain

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[23]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 601.

[24]*California Teachers Association v. Riles, supra,* 29 Cal.3d at page 813.

[25]*California Teachers Association v. Riles, supra,* 29 Cal.3d at page 810.

[26] *California Teachers Association v. Riles, supra*, 29 Cal.3d at pages 811-813, footnote 16.

[27]*California Statewide Communities Development Authority v. All Persons Interested* (2004) 116 Cal.App.4th 877 [10 Cal.Rptr.3d 803], review granted June 23, 2004.

[28]*California Statewide Communities Development Authority v. All Persons Interested, supra,* 116 Cal.App.4th at pages 819-820, quoting *California Educational Facilities Authority v.*

classrooms would not themselves be devoted to religious study is immaterial when the school program, as a whole, pervasively focuses on religious instruction.[29] *California Statewide Communities Development Authority* has been accepted for review by the Supreme Court and, therefore, the Court of Appeal's decision is no longer precedent. Nevertheless, the court's analysis is instructive. Moreover, the Attorney General's Office is appearing as an intervener in this case before the Supreme Court. In our arguments to the court we have suggested that providing aid in the form of lower-than-market priced financing to a pervasively sectarian school violates that California Constitution, regardless of the nature of the projects (gym, classroom, chapel) funded with the proceeds.

The court in *California Statewide Communities Development Authority* also cited to the Attorney General's University of Judaism Opinion for a discussion of what constitutes a "pervasively sectarian" institution.[30] This opinion was issued in response to the California Educational Facilities Authority's question as to whether it could provide assistance to the University of Judaism under the program described in *Priest*.[31] This office analyzed, among other things, the effect of article XVI, section 5 on the Authority's proposed conduit loan on behalf of the University. The Attorney General concluded that the Authority would have to determine (a) whether the University requires its students to receive "instruction in the tenets" of Judaism, (b) whether the University is "pervasively sectarian," and (c) whether the monies loaned to the University will be used for "sectarian purposes." We advised that an affirmative resolution of any of those inquires would preclude the Authority from providing assistance to the University.[32] While these factors are specific to determining the nature of an educational institution, they can be used to help determine whether non-educational applicants to the Endowment's grant program would similarly be found to be "pervasively sectarian."

B. Article XVI, Section 5 Conclusion.

As you can see from the analysis above, a determination on whether an application for grant funds can be approved to reconstruct or renovate a building with historical or current

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Priest, supra, 12 Cal.3d at page 604.

[29]*California Statewide Communities Development Authority v. All Persons Interested, supra,* 116 Cal.App.4th at pages 821-822.

[30]66 Ops.Cal.Atty.Gen. 50 (1983).

[31]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d 593.

[32]66 Ops.Cal.Atty.Gen. 50, 51 (1983).

religious affiliations consistent with article XVI, section 5 is dependent on the facts of the application; therefore our advice here must be general. Additionally, because we are constrained by the level of certainty that this office must reach in order to issue an unqualified opinion as to the validity of the bonds issued pursuant to Proposition 40, we are not in a position to conclude that a certain type of grant would always be found to conform to the Constitution without additional facts as well. We can, however, make several observations about what factors the Endowment should consider in entertaining a grant application.

First, the touchstone for deciding whether a grant for the reconstruction or renovation of a building with historical or current religious affiliations complies with article XVI, section 5 is whether it will have a "direct, immediate, and substantial effect of advancing religion." A grant application with this effect of promoting religious purposes is unconstitutional. Conversely, the grant would be consistent with this section if it only provides indirect, remote and incidental benefits to religion and has a secular primary purpose. Under these standards, it would appear difficult to find that a grant would not have a direct effect of advancing religion if the proposed project concerns a building that is owned by a religious organization or has a current religious affiliation.

With reference to the other factors you have asked about, whether the building or facility is currently in public ownership or is currently affiliated with a religious organization raises similar concerns. Keeping the bond standard in mind, it is more likely that we could find a grant of bond proceeds consistent with article XVI, section 5 if it will be used to reconstruct or rehabilitate a building or facility that is owned by a governmental entity or a non-sectarian institution without affiliations to a religious organization. Additionally, there should be a secular primary purpose for the grant. The determination of whether a non-sectarian institution or governmental entity has such a purpose will, by its nature, be fact-based, and, as the decision in *Hewitt* demonstrates, the courts will look beyond an articulated public purpose to consider the over-all effect of the government assistance.

Finally, whether the building or facility is not being used for a religious purpose, or whether the purpose of the grant has a strong public safety purpose, such as satisfying the requirements of the Americans with Disabilities Act, is not determinative of whether the grant would comply with article XVI, section 5. While it might be more easily argued that grants for these purposes do not directly advance religion, consideration must still be given to whether the institution receiving the grant is "pervasively sectarian." Even a strong secular purpose cannot justify a grant for renovation or public safety improvements if religion at the institution is so pervasive that the benefits of this work would be subsumed by this religious mission. In determining whether an entity is "pervasively sectarian," the Endowment should consider whether the ultimate beneficiary of the grant funds: (a) is a church or religious order, or otherwise imposes religious restrictions on its members, students or the persons using its

buildings or facilities; (b) is an institution that has as a substantial purpose the inculcation or advancement of religious values; or (c) imposes religious restrictions on who may use its buildings and facilities. To the extent any of these questions is answered in the affirmative, the entity is likely to be "pervasively sectarian."

Discussion of the "No Preference Clause" of Article 1, Section 4 of the California Constitution

A. The No Preference Clause Prohibits Even the Appearance of Preference.

Article I, section 4 of the California Constitution provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." This provision is commonly referred to as the "no preference" clause.[33] California courts have interpreted the no preference clause in article I, section 4 to require that not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially.[34]

1. Whether Government Aid Appears to Prefer Religion Involves a Factual Determination.

To determine whether a grant by the Endowment would be consistent with the article I, section 4 would require a review of the facts in each instance. As explained by the court in *Carpenter v. City and County of San Francisco* (1996) 93 F.3d 627, 629,"[t]he cases interpreting the No Preference Clause stress the importance of the historical and physical context surrounding a challenged religious display on public property."

The type of factual inquiry conducted by the courts in no preference clause cases is illustrated by the California Supreme Court's decision in *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792. In *Fox,* the City displayed a large illuminated Latin cross on city hall during Christmas and Easter holidays. The court noted the location and size of the cross, as well as the fact that it was visible "for many miles in many directions, and can be and is viewed by persons driving the freeways. . . ."[35] It also was persuaded by the observation that no symbols of other religions or non-religious celebrations were displayed with the cross, and found that "[i]n the California Constitution there is no requirement that each religion always be represented. To illuminate only the Latin cross, however, does seem preferential when comparable recognition of

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[33]*Okrand v. City of Los Angeles* (1989) 207 Cal. App.3d 566 at page 579.

[34]*Hewitt v. Joyner* (1991) 940 F.2d 1561 at page 1567.

[35]*Fox v. City of Los Angeles, supra,* 22 Cal.3d at page 794.

religious symbols is impracticable."[36] Based on these factors, plus the significance of the single-barred cross as a religious symbol particularly pertinent to the Christian faith, the court concluded that "the real purpose is a religious one," and held the display unconstitutional.[37]

Fox does not stand for the proposition, however, that government may never support religious displays or symbols out of concern for violating the no preference clause. The court in *Fox* distinguished the case before it from *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, a prior case in which the court had held that a library could contain the King James version of the Bible without violating the Constitution. The court explained, "[l]ibrarians quite easily can offset a potential for preference, but a city hall tower is much less tractable than are shelves of a school library."[38]

Following this observation, the Court of Appeal in *Okrand v. City of Los Angeles* (1989) 207 Cal.App.3d 566, permitted the display of an unlit menorah in the rotunda of the Los Angeles City Hall. The court found the display did not exhibit a preference for one religion because there was recognition of other religious symbols; the display of the menorah did not dominate the exhibit; the particular menorah displayed (the Katowitz Menorah saved from the Holocaust) was more a museum piece than a symbol of religious worship; and the "menorah also differs in degree from the Latin cross in terms of its significance as a symbol of religion."[39]

The principles articulated in *Fox*, *Ellis* and *Okrand* are consistent with United States Supreme Court decisions in cases such as *Lynch v. Donnelly* (1984) 465 U.S. 668, in which the court found a city's public Christmas display that included a creche to be permissible under the federal Constitution. The court concluded that in the context presented:

> . . . what viewers may fairly understand to be the purpose of the display-- [just] as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of the content.[40]

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[36]*Fox v. City of Los Angeles, supra,* 22 Cal.3d at page 797.

[37]*Fox v. City of Los Angeles, supra,* 22 Cal.3d at page 795.

[38]*Fox v. City of Los Angeles, supra,* 22 Cal.3d at page 797.

[39]*Okrand v. City of Los Angeles, supra,* 207 Cal.App.3d at pages 579 and 580.

[40]*Lynch v. Donnelly, supra,* 465 U.S. at page 692.

The *Lynch* court also mentioned that the National Gallery in Washington, maintained with government support, exhibited artistic masterpieces with religious messages, and that the court's own chamber was adorned with a mural of Moses and the Ten Commandments.[41]

In contrast, a historic context, or setting that neutralized the religious theme was found to be missing in *Hewitt v. Joyner.* In considering whether San Bernardino County's ownership and maintenance of a park that contained exclusively immovable religious statuary depicting scenes from the New Testament violated the no preference clause of the California Constitution, the Ninth Circuit Court of Appeals distinguished the county's park from paintings of religious subjects in a museum:

> However, every religious display that is put in an 'artistic' form, such as painting or sculpture, instead of the "mannequin-like" form of the creche or cross is not saved from First Amendment scrutiny.
> . . .
>
> A "typical" museum, like the city hall in *Okrand,* may display a variety of artwork. The Antone Martin Memorial Park is restricted to only the artwork already in existence. Unlike the library considered by the state supreme court in *Evans,* the County here may not "easily . . . offset a potential for preference." [Citation]. In addition, the religious nature of the statues is emphasized by their surroundings -- the neighboring church and hill-side cross. The effect and message of the park is a religious one.[42]

The *Hewitt* court concluded that, regardless of the county's intentions, it had violated the California Constitution by appearing to endorse the religious themes of the sculptures in the park.[43]

2. The Courts Have Used Five Factors as a Guide in Analyzing Whether Government Aid Appears to Prefer Religion.

In *Ellis v. City of La Mesa* (9th Cir. 1993) 990 F.2d 1518, the court distilled several factors from *Fox, Okrand,* and *Hewitt* relevant to determining whether a public display violates the

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[41] *Lynch v. Donnelly, supra,* 465 U.S. at pages 676-677.

[42] *Hewitt v. Joyner, supra,* 940 F.2d at page 1568.

[43] *Hewitt v. Joyner, supra,* 940 F.2d at page 1569.

California Constitution's no preference clause:[44]

(1) the religious significance of the display;
(2) the size and visibility of the display;
(3) the inclusion of other religious symbols;
(4) the historical background of the display; and
(5) the proximity of the display to government buildings or religious facilities.[45]

Applying these factors in another case involving a cross on government property, the *Ellis* court found that the mere fact that the display was on public property was not enough to find it unconstitutional; in contrast to *Fox* and *Okrand*, this display was not located near a city hall. The court reasoned, however, that "the size and religious significance of the cross, along with the lack of other religious symbols or independent historical significance, creates an appearance of religious preference."[46] The court held, in essence, that the cumulative effect of the factors conveyed an unconstitutional message of government involvement with religion.

The *Ellis* factors do not constitute a definitive test, but provide a list of the issues that should guide an analysis under the no preference clause.[47] And, if *Ellis* does not directly address questions relating to public funding of religious displays or structures, this is likely because the source of funding of the religious display in the case was not at issue. Nevertheless, consistent with the *Ellis* court's admonition that no one factor can determine whether a government action creates an impermissible appearance of religious preference,[48] it seems that government grant funding for a project at a religious facility is a matter that could raise an issue under the no preference clause. If the effect of governmental funding, in conjunction with the other factors identified above, creates the appearance of an endorsement of one religion by the government, this would violate the clause.

B. Article 1, Section 4 "No Preference Clause" Conclusion:

There is no single answer to the question whether the Endowment may grant funds

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[44]*Ellis v. City of La Mesa, supra,* 990 F.2d at pages 1524-1525.

[45]*Ellis v. City of La Mesa, supra,* 990 F.2d at pages 1524-1525.

[46]*Ellis v. City of La Mesa, supra,* 990 F.2d at pages 1526.

[47]*Carpenter v. City & County of San Francisco, supra*, 93 F.3d at p. 630.

[48]*Ellis v. City of La Mesa, supra,* 990 F.2d at pages 1526.

consistent with the no preference clause for the reconstruction or renovation of buildings or facilities with historical or current religious affiliations. Instead, a number of factors should be considered when determining whether the grant would be constitutional, including whether the facility has significance beyond its association with a religion or whether, like a library or museum, it presents a variety of information, art or artifacts pertaining to a range of religions and secular subjects. As part of this analysis, the issues raised by the Endowment's questions would be relevant. For instance, while the *Hewitt* decision indicates it is not determinative, a grant to a facility that is owned by a government institution has less of an appearance of favoring religion than a grant to an organization that is religious or has an religious affiliation. Similarly, where the grant has an identifiable secular purpose or context that does not appear to favor a religion, such as the repair of a building not used for religious purposes or renovation to achieve health and safety objectives, this could offset any unconstitutional appearance of preference of one religion over another. In the end, what is important to consider is that the California Constitution prohibits not only actual preference, but the *appearance* of a preference, and no one factor such as the ability to articulate a secular purpose has been persuasive to the courts.

Discussion of the "Establishment Clause" of Article 1, Section 4 of the California Constitution

A. The California Constitution's "Establishment Clause" Coincides With the Intent and Purpose of the Federal "Establishment Clause."

California courts have found that the protection against the establishment of religion in article 1, section 4 of the California Constitution[49] does not create broader protections than those of the First Amendment, and that the California concept of a "'law respecting an establishment of religion' coincides with the intent and purpose of the First Amendment Establishment Clause."[50] For that reason, in interpreting the California establishment clause, the courts have been guided by decisions pertaining to the establishment clause of the First Amendment of the United States Constitution.[51]

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[49]Article 1, section 4 of the California Constitution provides that "[t]he Legislature shall make no law respecting an establishment of religion."

[50]*East Bay Asian Local Development Corporation* v. *State of California, supra,* 24 Cal.4th at page 718.

[51]*East Bay Asian Local Development Corporation* v. *State of California, supra,* 24 Cal.4th at page 719.

1. The "*Lemon* Test" Has Been Established by the Courts as a Tool to Analyze the Federal Establishment Clause.

The United States Supreme Court has repeatedly recognized that government action must be carefully examined to ascertain whether the action "furthers any of the evils against which [the Establishment] Clause protects. Primary among those evils have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[52] Achieving constitutional neutrality in light of the establishment and free exercise clauses has been a difficult challenge, as the developing jurisprudence of the First Amendment demonstrates.[53] The California Supreme Court has summarized the status of the law as: "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[54]

In *Lemon v. Kurtzman*, *supra*, 403 U.S. 602 ("*Lemon*"), the United States Supreme Court, building upon earlier cases, developed an analytical framework under which a statute challenged under the establishment clause should be examined to assess whether the conduct is constitutionally forbidden. While it is not the sole tool for an establishment clause analysis, this analytical framework, referred to as the "*Lemon* test," has been used by California courts in applying the establishment clause of California Constitution article 1, section 4.[55]

The three prongs of the "*Lemon* test," as applied to government activity, have been articulated as: "First, the challenged government activity must have a secular legislative purpose; second, the principal or primary effect of the activity must be one that neither advances nor inhibits religion; third, the activity must not foster an excessive government entanglement with

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[52]*Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 771-772, citing to *Walz v. Tax Commission* ("*Walz*")(1970) 397 U.S. 664, 668 and *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612.

[53] *Van Orden v. Perry* (2005) __ U.S. __ [125 S.Ct. 2854]; *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005) __U.S.__ [125 S.Ct. 2722].

[54]*East Bay Asian Local Development Corporation* v. *The State of California, supra,* 24 Cal.4th at page 705, quoting *Walz v. Tax Comm'n, supra,* 397 U.S. at page 668.

[55]*East Bay Asian Local Development Corporation* v. *The State of California, supra,*24 Cal.4th at pages 705-706.

religion."[56] If the conduct satisfies all three prongs of the test, it is not constitutionally forbidden.

a. Each Grant Must Have a Secular Purpose.

The question whether a particular Endowment grant has a secular legislative purpose will be viewed by a court as essentially "whether the purpose behind the [grant] is to endorse or disapprove religion."[57] "If the government articulates a plausible secular purpose, this should be accepted absent a contrary showing by the challenger."[58] Given this standard, we anticipate that a court would find that any grant serving one or more of the authorized purposes of the Endowment's grant program as established by Education Code section 20050 et seq. is made for a purpose other than to "endorse or disapprove religion."

b. Each Grant Must Avoid Having the Effect of Endorsing or Approving Religion.

Whether a grant meets the second criterion of the *Lemon* test will depend on the facts of each grant. The second prong of this test, which explores whether the principal or primary effect of the activity is one that neither advances nor inhibits religion, "asks whether, *irrespective of government's actual purposes,* the practice under review *in fact* conveys a message of endorsement or approval."[59]

The Supreme Court has, in the last twenty years, frequently discussed its views on the *Lemon* test's second prong and articulated several different standards to be considered in determining whether a government action has the "effect" of advancing religion. As an example, in *Agostini v. Felton* (1997) 521 U.S. 203, the court suggested a governmental aid program might have the prohibited effect of advancing religion if any religious indoctrination that occurs in the schools receiving the aid "could reasonably be attributed to governmental action" or if the "use

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[56]*Singh v. Singh* (2004) 114 Cal.App.4th 1264, 1286, citing *Lemon v. Kurtzman, supra,* 403 U.S. at pages 612-613; accord, *California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d 593 at page 600.

[57]*Singh v. Singh, supra,* 114 Cal.App.4th at page 1287.

[58]*Singh v. Singh, supra,* 114 Cal.App.4th at page 1286, citing *Wallace v. Jaffree* (1985) 472 U.S. 38 at pages 74-75.

[59]*Singh v. Singh, supra,* 114 Cal.App.4th at page 1287, quoting from *Lynch v. Donnelly, supra,* 465 U.S. at page 690; emphasis added.

of aid to indoctrinate religion could be attributed to the state."[60] In other Establishment Clause cases involving religious displays, the Supreme Court has phrased the inquiry as whether the display "sends the ancillary message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[61] Other courts have considered "whether the criteria for disbursement of the aid creates a financial incentive to undertake religious indoctrination."[62]

These comments from the relevant federal law illustrate that a more detailed discussion of this prong of the *Lemon* test is unwarranted here because the concerns stated in these cases about government aid programs demonstrating a preference for religion are already addressed by California's more stringent "no aid to religion" provisions. As discussed above, article XVI, section 5 forbids any government involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.[63] Sectarian institutions may only receive "indirect, remote and incidental benefits" from state government programs, and these programs must have a secular primary purpose. A government action meeting these standards should also avoid having the effect of endorsing or approving religion within the meaning of article I, section 4.

As a final note, like the California Supreme court in *Riles*, the U.S. Supreme Court in *Hunt v. McNair* (1973) 413 U.S. 734, 743, described aid as having an unconstitutional "primary effect" of advancing religion "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Some courts have questioned the continuing vitality of this "pervasively sectarian" aspect of the *Lemon* test, although the Supreme Court has not overturned it.[64] In light of California's exacting restriction on providing aid to pervasively sectarian institutions, however, it is unnecessary to expand upon

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[60]*Agostini v. Felton, supra,* 521 U.S. 203 at pages 230-231.

[61]*Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290 at pages 309-310, citations and quotation marks omitted.

[62]*Barnes-Wallace v. Boy Scouts of America* (2003) 275 F.Supp.2d 1259 at page 1267, citing Justice O'Connor's concurring opinion in *Mitchell v. Helms* (1999) 530 U.S. 793, 845.

[63]*California Educational Facilities Authority v. Priest, supra,* 12 Cal.3d at page 605.

[64]*Barnes-Wallace v. Boy Scouts of America, supra*, 275 F. Supp.2d at pages 1268-1269; *Mitchell v. Helms, supra*, 530 U.S. at page 826 (plur. opn. of Thomas, J.).

this aspect of federal establishment clause jurisprudence. As interpreted by the California courts, any grant to a "pervasively sectarian" institution would be barred by the "no aid to religion" clause in article XVI, section 5 because it would have the effect of promoting religion regardless of the establishment clause analysis.

c. Each Grant Must Avoid Creating "Excessive Entanglement" Between the Government and a Religious Institution.

The decision in *Agostini v. Felton, supra*, 521 U.S. 203, 234, cast some doubt on whether concerns about government programs creating "excessive entanglement" between government and religious institutions should be considered in the course of assessing whether aid has an impermissible effect of advancing religion or as a separate third prong of the *Lemon* test. Regardless, the factors the United States Supreme Court identifies as relevant in determining "excessive entanglement" are the same.[65] Those are "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[66]

Because article XVI, section 5 prohibits direct aid to a pervasively sectarian institution, it is unlikely that the Endowment would face a factual scenario where this criterion would be an issue. If aid to a religiously-affiliated institution could be approved, however, it is conceivable that a grant would require inspection of a facility, or monitoring of the expenditures of grant funds pursuant to the grant agreements administered by the Endowment. Depending on the nature of the project and the relationship with the religious institution, it is possible that the Endowment would need to address this issue.

Although recent judicial opinions have criticized rules and laws that invite officials "trolling through a person's or institution's religious beliefs,"[67] the courts have determined that monitoring of grant programs does not create excessive entanglement.[68] As we understand it, the Endowment does not directly administer the grant recipients' expenditure of funds, but merely

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[65]*Agostini v. Felton, supra,* 521 U.S. at page 232.

[66]*Agostini v. Felton, supra,* 521 U.S. at page 232, quoting from *Lemon v. Kurtzman, supra*, 403 U.S. at page 615; see also *Swaggart Ministries v. Cal. Bd. of Equalization* (1990) 493 U.S. 378, 393.

[67]*Mitchell v. Helms, supra,* 530 U.S. at page 828.

[68]*Agostini v. Felton, supra,* 521 U.S. at page 233, citing *Bowen v. Kendrick* (1988) 487 U.S. 589 at pages 615-617.

reviews invoices to determine if they were spent for approved purposes, and whether the expenses comply with its guidelines. The California Supreme Court has found that periodic inspection of a facility does not amount to excessive entanglement.[69] Since inspecting a facility on the site of the institution would not be excessive entanglement, a court should likewise find that reviewing invoices to ensure compliance with the grant conditions would not involve "excessive entanglement" with religion.

B. Article 1, Section 4 "Establishment Clause" Conclusion.

The establishment clause would not add any limitations to the Endowment's grant program beyond those already identified in the discussions of the no aid to religion and no preference clauses. For example, we anticipate that a court would find that any grant for the reconstruction or renovation of a building with a historic or current religious affiliation would still meet the secular purpose requirement of the *Lemon* test as long as it served one or more of the identified purposes in the Endowment's legislation. Certainly, the grant would meet this portion of the test if it was for the purpose of constructing health and safety improvements.

As to the second part of the *Lemon* test - whether the principal or primary effect of the activity is one that neither advances nor inhibits religion - this will normally be answered by the application of the no aid to religion provisions of the California Constitution addressed at the beginning of this letter. For the reasons we discussed, it would appear difficult to find there is no direct or principal effect of advancing religion if a grant is approved to renovate or reconstruct a building that is owned by a religious organization or has a current religious affiliation. And even where the structure is owned by a secular entity, there must be secular primary purpose for approving the grant, with only an indirect, remote or incidental benefit to religion. Finally, whether the building or facility is not currently used for religious purposes is not determinative. Again, as under article XVI, section 5, the question is whether the structure is part of a an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. If the answer to this question is yes, then the grant would raise concerns under the establishment clause.

The final prong of the *Lemon* test, avoiding excessive entanglement with religion, would not be problematic for the Endowment. A court would uphold the Endowment's program of reviewing invoices for compliance with grant conditions.

As we noted at the outset, the laws governing the relationship between government and religion are complex and fact oriented. Just last year, the United States Supreme Court issued two decisions, one striking down a display of the Ten Commandments in Kentucky

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[69] *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593 at page 602.

courthouses,[70] and another upholding the placement of the Ten Commandments on a monument on the grounds of the Texas State Capitol.[71] In these and other opinions, the courts have recognized that the specific history and context of a religious structure or display are critical factors in determining whether a government action will survive a constitutional challenge.[72] In such cases "detail is key."[73] Given the myriad of grant application hypothetical situations, and the impossibility of defining a bright line rule applicable to all scenarios, more fact-specific inquiries will allow us to provide more detailed guidance and advice to the Endowment in the future. We therefore invite you to consult with our office regarding the constitutionality of potential grant applicants as situations arise. In the meantime, however, you should feel free to ask us if you have any questions or comments about our analysis in this letter.

Thank you for raising these matters to our attention. We look forward to continuing to work with the Endowment in accomplishing its objectives of preserving California's cultural heritage.

Sincerely,

MATTHEW RODRIQUEZ
Senior Assistant Attorney General

For BILL LOCKYER
Attorney General

cc: Marian Moe, Deputy Attorney General

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[70] *McCreary County v. American Civil Liberties Union of Kentucky, supra*, ___ U.S. ___, [125 S.Ct. 2722].

[71] *Van Orden v. Perry, supra*, ___ U.S. ___, [125 S.Ct. 2854, 2867].

[72] *Van Orden v. Perry, supra*, ___ U.S. ___, [125 S.Ct. 2854, 2869-2870] (conc. opn. of Breyer, J.).

[73] *McCreary County v. American Civil Liberties Union of Kentucky, supra*, ___ U.S. ___, [125 S.Ct. 2722, 2738].